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Superior Court of the State of Washington
For Thurston County

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Re: ***Johnny B. Delashaw, Jr v. State Health, Medical Quality Assurance Commission***
Thurston County Case No. 18-2-04912-34

Dear Counsel:

On August 30, 2019, this matter came before the Court on Dr. Delashaw's Petition for Judicial Review, pursuant to RCW Chapter 34.05.

The Court has considered the record and file herein and oral argument, and now AFFIRMS the final order (Amended Corrected Findings of Fact, Conclusions of Law and Final Order) entered by the Department of Health Medical Quality Assurance Commission dated August 31, 2018.

1. Did the presiding officer err in allowing testimony and evidence of certain witnesses?

The petitioner argues violation of due process. The petitioner also argues violation of ER 404(b). "A medical professional's license represents a property interest and cannot be revoked without due process." Washington Med. Disciplinary Bd. v. Johnston, 99 Wn.2d 466, 474 (1983).

"A basic requirement of due process is a fair trial in a fair tribunal." Withrow v. Larkin, 421 U.S. 35, 46 (1975)

The "appearance of fairness" doctrine requires that the agency not only act fairly, but do so with an appearance of fairness. Ultimately, "...proceedings before a quasi-judicial tribunal are valid if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial and neutral hearing." Johnston, supra, at p. 478.

"The presumption is that administrative decisionmakers perform their duties properly and the party claiming a violation must present specific evidence to the contrary, not speculation." Faghih v. Dept. of Health, 148 Wn.App. 836, 843 (2009).

In the instant case, notwithstanding arguments of the petitioner, the Statement of Charges included references to "staff" and "coworkers," thereby not limiting the allegations to improper conduct directed toward nurses. Moreover, hearsay evidence may be admissible in administrative proceedings.

With respect to ER 404(b), although the presiding officer did not conduct the proper balancing test required in well-established caselaw, nor rule on any claimed exceptions, this Court finds no prejudice to the petitioner. Error is not prejudicial unless it affects the outcome of the proceeding. Here, importantly, the Findings of Fact make no reference to any of the disputed testimony at issue; Rather, apart from the testimony of Doctor Hutchinson, the Findings were based on testimony elicited from nurses. In addition, the testimony of the physicians, over the objection of petitioner, was not limited to hearsay. The physician witnesses also testified regarding first-hand observations. It is clear to this Court that the fact-finding panel properly weighed the evidence, made findings based primarily (if not solely) upon the testimony of nurses, and did not rely on testimony of the physician witnesses. Accordingly, the petitioner fails to establish that the proceeding was fundamentally unfair, either in substance or by appearance.

2. Does the record contain substantial evidence to support the Findings of unprofessional conduct?

Yes. This Court may not independently weigh the credibility of witness testimony, nor independently determine what weight, if any, should be afforded. This Court must view the evidence in a light most favorable to be prevailing party and accept the credibility determinations of the Commission.

There is no evidence in the record to substantiate the petitioner's argument that the testimony of the nurses was the product of collusion or collaboration. The testimony was, primarily, consistent with respect to salient allegations. The nurse witnesses admitted to friendships between them, but friendship and communication does not necessarily imply collusion. Again, the Commission, as fact-finder, is entitled to great deference on issues of credibility.

The petitioner argues that the Commission's Findings regarding Dr. Neff were arbitrary or capricious, based in part upon the undisputed fact that Dr. Neff did not conduct a personal examination. The Commission found that Dr. Neff had more professional experience with cases involving disruptive providers. In addition, the Commission determined Dr. Neff's testimony to be "logical" and in the context of an organizational setting. Conversely, the commission found the testimony of Dr. Vanderbelt to be less persuasive.

3. As a matter of law, did the Commission err in its Findings of unprofessional conduct?

Findings of Fact 1.6 through 1.30 are supported by substantial evidence in the record. The testimony and other evidence on the record are persuasive and consistent.

The Commission found that the unprofessional conduct of the petitioner contributed to a loss of experienced professionals and staff, thereby placing patients at increased risk. The record is replete with evidence regarding nurse and staff complaints, instances of being intimidated, being subjected to retaliation, and discouraged. Dr. Neff's expert testimony

included, "if you alienate (staff) by intimidation or threatening behavior, those (staff) are not as likely to come forward…and express their concerns for patient safety…"

4. Were the sanctions arbitrary or capricious, or outside the authority of the Commission?

RCW 19.13160 requires the disciplining authority to sanction a license holder upon a finding of unprofessional conduct. It is the "paramount responsibility" of the disciplining authority to "safeguard the public's health and safety."

An agency's determination of sanctions should be accorded considerable judicial deference as it is peculiarly a matter of administrative confidence." Washington Fed'n of State Employees v. Bd. Of Trustees, 93 Wn.2nd 60, 68-69 (1980).

"… the scope of review of an order alleged to be arbitrary or capricious is narrow and the challenger carries a heavy burden." Keene v. Bd. Of Accountancy, 77 Wn.App. 849, 859 (1995).

"Arbitrary and capricious action is willful and unreasoning action without consideration and in disregard of facts and circumstances." Heinmiller v. Department of Health, 127 Wn.2d 1020 (1995).

The sanctions imposed by the Commission were not arbitrary, nor capricious. They were not manifestly unreasonable. They were not based on untenable grounds or for untenable reasons. The sanctions were permissible pursuant to RCW 18.13.160. The sanctions were grounded in the expertise and clinical judgment of the Commission.

Accordingly, the Court AFFIRMS the Final Order issued by the Medical Quality Assistance Commission. The Court will sign an Order consistent with this ruling.

Sincerely,

Judge James J. Dixon

Cc: Clerk's office for filing